Supreme Court, U.S.
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MAR 13 1997
CLERK

CASE NO. 96-828

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE DRY CREEK RANCHERIA,

Petitioner,

vs.

JAMES R. and COLETTE R., BRIDGET AND LUCY R., and VISTA DEL MAR CHILD AND FAMILY SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MINOR CHILDREN'S MOTION AND AFFIDAVIT OF COUNSEL FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Bridget and Lucy R.

33 pp

MOTION AND AFFIDAVIT OF COUNSEL FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent minor children, Bridget and Lucy R. hereby moves for leave to proceed *in forma pauperis* in this case and submits the following affidavit of counsel in support thereof:

I, Mitchell L. Beckloff, am counsel of record for the respondent minor children Bridget and Lucy R. in the above-entitled case. The California Court of Appeal, Second Appellate District, Division Three appointed me to represent Bridget and Lucy R. in the appellate proceedings in this matter on July 18, 1995. A copy of the court's order is attached hereto. The Los Angeles County Superior Court, State of California, also appointed counsel to represent the minor children in the proceedings before that court.

The Court has requested that Bridget and Lucy R. respond to the Petition for Writ of Certiorari filed by The Dry Creek Rancheria currently pending before this Court.

Bridget and Lucy R., the subject of these proceedings, were born in November 1993 and are just over three years old. The minor children do not have any assets to assist them in paying the fees and costs associated with filing a response in this matter. Accordingly, the minor children seek leave to proceed in this matter *in forma pauperis*.

Moreover, the minors' birth parents, Richard A. and Cindy A. are also indigent. Richard A. and Cindy A. proceeded *in forma*

pauperis before this Court concerning this same matter. Richard A. and Cindy A. filed their Petition for Writ of Certiorari to the Supreme Court of the United States *in forma pauperis.* The petition was denied. (Case No. 96-5971.)

The following responses are made on my information and belief. I have made inquiry and believe that the responses are true.

1. Are the minor children presently employed? NO. The minor children are three years old and have never been employed.
2. Have the minor children received within the past 12 months any income from a business, profession, other form of self-employment, rent payments, interest, dividends, retirement, annuity payments, alimony, welfare, social security, disability compensation, workmen's compensation, or any other source? No.
3. Do the minor children own any cash or have any checking or savings accounts? No.
4. Do the minor children own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.
5. The minor children are supported by James and Colette R., respondent parties herein. James and

Colette R. are the persons identified by Richard A. and Cindy A. to adopt the minor children.

6. Have the minor children ever filed a motion in this court for leave to proceed *in forma pauperis* in any other appeal? No.

7. The minor children have not retained an attorney to represent them. An attorney was appointed on July 18, 1995 to represent the minor children in the California Court of Appeal. (The order appointing counsel is attached hereto.)

I swear under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of March, 1997 in Santa Monica, California.

Mitchell L. Beckloff

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 3

In re BRIDGET R., et al. Minors.	
JAMES R. and COLETTE R., Petitioners and Appellants, v. CINDY R. and RICHARD A., Objectors and Respondents; DRY CREEK RANCHERIA, et. al., Intervenors and Respondents.	B093520 (Super. Ct. No. BN1980 consol. w/ BC114849 (John Henning, Judge)

COURT OF APPEAL - SECOND DIST.
FILED
JUL 18 1995
JOSEPH A. [illegible]
GAVINSKI Clerk
Deputy Clerk

THE COURT:

The following attorney is appointed counsel for respondent Bridget and Lucy R. on this appeal:

MITCHELL BECKLOFF

Appellant's opening brief should be filed no later than August 7, 1995. Respondent's brief must be filed no later than August 21, 1995. Appellant's reply brief shall be filed on or before August 31, 1995.

All briefs filed by amicus curiae must be filed no later than August 14, 1995. All responses to the amicus curiae briefs must be filed no later than August 31, 1995.

Presiding Justice

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CASE NO. 96-828

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MINOR CHILDREN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Bridget and Lucy R.

QUESTIONS PRESENTED

1. Does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the equal protection component of the Fifth Amendment to the United States Constitution require that the Indian Child Welfare Act of 1978 [25 U.S.C. 1901 et seq.] ("ICWA") be construed to limit its applicability to children whose parent or parents have significant social, cultural, or political connections to a federally recognized Indian tribe?

2. Does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the equal protection component of the Fifth Amendment to the United States Constitution preclude a minor child's familial relationship from being determined solely, or predominantly, on the basis of race?

3. Does the Due Process Clause of the Fifth Amendment and Fourteenth Amendments to the United States Constitution guarantee procedural and substantive protection of minor child's liberty interest in their adoptive family unit even if, on remand from an appellate court, a trial court determines that the child is an Indian Child under ICWA and the federal statute permits a birth parent to withdraw an otherwise valid prior relinquishment of the child for adoption?

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TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

TO THE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Minor Children Bridget and Lucy R., the subject of these proceedings, by and through their counsel of record, hereby answer and oppose the petition for writ of certiorari filed by The Dry Creek Rancheria. The minors respectfully request this Court deny the petition for writ of certiorari seeking review of the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, in this case.

Respectfully submitted,

Dated: March 11, 1997

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Minor Children, Bridget and Lucy R.

INTRODUCTION

This case does not involve a ruling by a California appellate court that ICWA is unconstitutional on its face or as written. It involves a ruling that ICWA may be unconstitutional if applied to certain children and their parents on the basis of their race - their genetic makeup - instead of on the basis of their political and socio-cultural ties to a federally recognized Indian tribe.

Factually this case centers around identical twins, Bridget and Lucy R., who were born on November 9, 1993 and are three years old. Bridget and Lucy live with James and Colette R. and the R.'s biological daughter, Hannah, in Columbus, Ohio. The twins have lived with the R. family for their entire lives.

Bridget and Lucy are not the biological children of James and Colette R. Richard A. and Cindy A. are the twins' biological parents.

The twins' biological parents decided to place the twins for adoption well before the twins were born. They selected James and Colette R. to be the adoptive parents of the yet unborn twins.

The twins' biological parents placed Bridget and Lucy after they were born with James and Colette R. through an adoption agency. The biological parents signed necessary paperwork and voluntarily relinquished their parental rights to the twins. Based on the biological parents' voluntary relinquishment of their parental rights under California law, the biological

parents no longer could challenge Bridget and Lucy's adoption by James and Colette R.

Some months after James and Colette P. returned to Ohio with the twins, their biological father for the first time claimed that the twins were Indians and that their adoption would violate the provisions of the Indian Child Welfare Act of 1978 [25 U.S.C. 1901 et seq.] ("ICWA"). Bridget and Lucy's biological parents demanded that James and Colette R. return Bridget and Lucy to them. The biological parents argued that because of ICWA, James and Colette R. could not adopt the twins. Petitioner, The Dry Creek Rancheria, the Indian tribe in which the twins' biological father claimed membership, intervened in the state court proceedings.

This case concerns whether the twins' biological parents and petitioner may invoke the protections of ICWA and unwind an otherwise valid adoption under state law if the biological parents have no social, cultural, or political connection to petitioner. In essence, this case is about recognizing three-year-old Bridget and Lucy as individuals and as citizens of California, instead of treating them as nothing more than a "natural resource" belonging to an Indian tribe.

Previously, this Court denied the biological parents' Petition for Writ of Certiorari to the Supreme Court of the United States (Case No. 96-5971).

OBJECTION TO JURISDICTION
(Pursuant to Supreme Court Rule of Court 15.4)

Petitioner invokes the jurisdiction of this Court through 28 U.S.C. section 1257, subdivision (a). Respondent Minor Children contend that the basis of jurisdiction relied upon by petitioner is misplaced and that this Court does not have jurisdiction under that section. Accordingly, Respondent Minor Children respectfully request that the petition for writ of certiorari be dismissed for lack of jurisdiction.

28 U.S.C. section 1257, subdivision (a) provides in pertinent part:

> "**Final judgments or decrees** rendered by highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question . . . on the ground of its being repugnant to the Constitution . . . of the United States . . . ." (Emphasis added.)

Petitioner has the burden of affirmatively establishing that jurisdiction properly rests with this Court. (Republic Nat'l Gas Co. v. State of Oklahoma, 334 U.S. 62, 70-71 (1948); see also U.S. Sup. Ct. Rule 24.1(e).) "The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction." (Republic Nat'l Gas Co. v. State of Oklahoma, 334 U.S. at 71.)

Petitioner seeks this Court's review of a state court opinion that cannot be deemed a final judgment. The California Court of Appeal ordered that this case be remanded for further

factual determinations. Specifically, the state appellate court found that based on the trial court's ruling none of the parties was able to present evidence concerning the critical issue of whether the petitioners had a "significant social, cultural or political relationship with the Tribe." (In re Bridget R., 41 Cal.App.4th 1483, 1522, modified, 42 Cal.App.4th 1193a (1996).) The California Court of Appeal required additional fact finding by the trial court in this matter to determine whether there was sufficient factual support to justify the application of the ICWA in Bridget and Lucy's case. (Id.) No factual record currently exists to allow Supreme Court review of statutory and constitutional issues.

This is more than a matter of semantics. No final judgment exists in this case. Remand is necessary not only to resolve ambiguities left by the trial court, but also to resolve factual issues which the trial court believed were irrelevant. This Court cannot review the issues in this case without a final judgment from the state court based on all relevant evidence that will be adduced at trial upon remand.

Further proceedings in the trial court are required before there is a judgment in this matter that finally determines the rights and liabilities of the parties. Only after such factual determinations are made in the trial court and a decision is rendered based on those facts will there be a final judgment for purposes of this Court's review pursuant to 28 U.S.C. section

1257, subdivision (a). The jurisdictional statute relied upon by petitioner does not authorize interim review. Premature review of this matter will likely result in an advisory opinion.

This Court has consistently held that where additional proceedings are required in the trial court, the judgment is not yet final for purposes of Supreme Court review. (See, e.g., Minnick v. California Dep't of Corrections, 452 U.S. 105, 120 (1981); Republic Nat'l Gas Co. v. State of Oklahoma, 334 U.S. at 71-72.)

This matter is subject to additional proceedings in the trial court (unless the parties are able to settle their disputes). At the conclusion of the proceedings, the trial court's determinations will again be subject to appeal in the California Court of Appeal. Given the nature of the proceedings required by the state appellate court opinion, the matter before this Court is not a final judgment. Accordingly, the petition must be dismissed for lack of jurisdiction under 28 U.S.C. section 1257, subdivision (a).

STATEMENT OF THE CASE

Richard A. and Cindy A., are the biological parents of three-year-old identical twins, Bridget and Lucy. The twins were born on November 9, 1993 in California. (CT[1] 2023-2024, 3077, 3081.)

Prior to the twins' birth, the twins' biological parents decided to place their children for adoption. (RT[2] 620.) In August 1993, the biological parents met with an adoption attorney, Durand Cook, to discuss placing their children for adoption. (RT 889.) During the course of that conversation, Mr. Cook explained the procedures necessary to properly place an Indian child for adoption. (RT 1027, 1081-1082.) While Cindy A.'s birth parent questionaire initially indicated that Ricard A. was of Indian heritage, later Richard A. told Mr. Cook that he did not have any Indian heritage. (RT 1025-1027, 1055-1057, 1079, 1082-1083.)

Mr. Cook and the twins' biological parents never again discussed Richard A.'s heritage prior to the twins' birth. (RT 899.) James and Colette R. did not learn of the discussion about

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[1] "CT" refers to the 19-Volume Clerk's Transcript filed in the California Court of Appeal.

[2] "RT" refers to the Reporter's Transcript filed in the California Court of Appeal.

Indian heritage between Mr. Cook and the biological parents until this litigation began.

The twins' biological parents through Mr. Cook selected James and Colette R. to be the adoptive parents of their children.

About two and one-half months after this initial meeting between Mr. Cook and the biological parents, Bridget and Lucy were born. James and Colette R. took the twins shortly after their birth to the R. home in Columbus, Ohio. (CT 2002-2003, 2040-2044, RT 408.)

On November 11, 1996, two days after the twins were born, Richard A. met with a representative of the adoption agency that was assisting in the adoption process. At that time, Richard A. signed a voluntary relinquishment of parental rights. (CT 2876-2879.) Cindy A. signed a voluntary relinquishment of parental rights on November 12, 1993. (CT 3001-3002.)

Under California law, the voluntary relinquishments of parental rights signed by the twins' biological parents surrendered and relinquished the twins to the adoption agency. The biological parents signed the relinquishments with the intent that the twins be placed with James and Colette R. for adoption. (CT 2876-2879, 3001-3002.) The relinquishment forms disclosed that after the signed form was filed with the state, all rights

to custody, services, and earnings from the child would be terminated.[3] (CT 2876-2879, 3001-3002.)

Several forms provided to Richard A. by the adoption agency specifically questioned Richard A. about his heritage and ethnicity. Richard A. did not disclose his Indian heritage on any of the forms. (CT 2856.) In fact, Richard A. knew at the time that he was lying. (RT 651.) Richard A. knew from his conversations with Mr. Cook that the twins' adoption by James and Colette R. would not proceed because of federal laws. (RT 637.)

On March 9, 1994, a representative from petitioner, the Dry Creek Rancheria, contacted the adoption agency that was involved in Bridget and Lucy's adoption and informed the agency that the twins were of Indian descent. (CT 2007.) On April 22, 1994, Richard A. wrote to the adoption agency and indicated that he wished to rescind his relinquishment. (CT 1994-1995, 2896.) Approximately one month later, the agency denied Richard A.'s request to rescind the relinquishment. (CT 2907.)

In September 1994, James and Colette R. filed an abandonment petition in the Los Angeles County Superior Court seeking to resolve the dispute between the parties. (CT 1.) Petitioner thereafter intervened and contended that the relinquishments

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[3] A properly executed relinquishment is final upon filing with the state and can be rescinded thereafter only by the mutual consent of the relinquishing parent(s) and the licensed adoption agency. (See In re Bridget R., 41 Cal.App.4th at 1494 n. 6.)

signed by the biological parents were invalid under ICWA.[4] (CT 127.)

The trial court determined that Bridget and Lucy were Indian children as defined by ICWA. (CT 885.) Consequently, the trial court found that the twins' parents' relinquishments of their parental rights were invalid. (CT 1772.)

The California Court of Appeal reversed the decision of the trial court.

The biological parents filed a petition for writ of certiorari with this Court. This Court denied the relief requested by the biological parents. (Case No. 96-828.)

The Dry Creek Rancheria also filed a Petition for Writ of Certiorari. This Court requested that the respondent minor children file a response to the petition.

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[4] ICWA requires that a voluntary termination of parental rights be signed in the presence of a judge and that the judge explain the terms and consequences of the termination. Further, under ICWA a voluntary termination of parental rights cannot validly be taken within 10 days of the birth of the child. (25 U.S.C. sec. 1913, subdivision (a).)

SUMMARY OF ARGUMENT

Respondent Minor Children contend that the writ petition should be denied for the following reasons:

1. No jurisdictional basis exists to allow this Court to hear this matter. 28 U.S.C. section 1257, subdivision (a) does not confer jurisdiction in this matter as there is no final judgment or decree for Supreme Court review as required by the statute relied upon by petitioners. (See Objection to Jurisdiction supra.)

2. The doctrine of ripeness counsels against Supreme Court review of this matter at this time. This Court may avoid making a constitutionally-based decision due to further proceedings that are required in the trial court.

3. The Respondent Minor Children's overwhelming need for stability and permanence requires a prompt resolution of these issues. Further trial court proceedings must be permitted to move forward immediately to reach a final judgment concerning the minors' custody. By denying review now, this Court will permit the matter to move forward in the trial court thereby allowing a final resolution (or settlement) of these matters. Thereafter, any aggrieved parties may seek appellate review of the final judgment as warranted.

4. Petitioner incorrectly asserts that the California Court of Appeal's decision "not only calls into question the constitutionality of the ICWA but all federal legislation that

applies to members of federally recognized Indian tribes." (Petition for Writ of Certiorari, p. 6, 7.) This sweeping interpretation of the state court opinion is overbroad and incorrect. The court below stated:

> "We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe." (In re Bridget R., 41 Cal.App.4th at 1492.)

Contrary to petitioners' assertion, the decision does not question the overall validity of ICWA and call into question "literally every piece of legislation passed by Congress affecting Indians as tribal citizens." (Petition for Writ of Certiorari, p. 7.) By its own terms, the state court opinion is extremely limited. The opinion is relevant only in the context of an effort to use ICWA to invalidate a voluntary termination of parental rights that is otherwise valid under state law and that involves a child who is not domiciled on a reservation.

5. The California Court of Appeal decision does not conflict with principles of self-government as enunciated in Morton v. Mancari, 417 U.S. 535 (1974).

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED AS THIS CASE IS NOT RIPE FOR SUPREME COURT REVIEW.

Even if jurisdiction properly lies with this Court pursuant to 28 U.S.C. section 1257, subdivision (a), as a matter of policy this Court should deny the writ petition based on considerations of ripeness. The procedural posture of this case dictates against reviewing the California Court of Appeal opinion because it may result in piecemeal adjudication before this Court. This matter has been remanded for further fact finding by the trial court. Future events will affect this controversy. Supreme Court review is not appropriate until after the matter is fully litigated and a full evidentiary record is created.

Traditionally, this Court does not decide constitutional questions unless doing so is absolutely necessary. (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) [Brandeis, J. concurring].) This Court seeks to avoid deciding constitutional issues unnecessarily. (Poe v. Ullman, 367 U.S. 497, 503 (1961).) Judicial restraint will be exercised unless a litigant has been immediately harmed or there is a threat of imminent harm. (Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 201 (1983).)

The doctrine of ripeness provides that this Court should not hear a matter until the issues have been fully litigated and there is a complete factual record before this Court to assist it in making decisions of constitutional magnitude. Under the doctrine of ripeness, two considerations must be examined: First, is whether the matter is fit for judicial decision. Second, is whether hardship to the parties will occur if court consideration of the matter is withheld. (See Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 201 [quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967)]; Poe v. Ullman, 367 U.S. at 509.)

A matter is fit for judicial decision by this Court only where all of the issues have sufficiently crystallized and become concrete. Abstract disagreements are not the sort of controversies that are ripe for judicial review. (Abbot Laboratories v. Gardner, 387 U.S. at 148.)

The California Court of Appeal opinion in this matter directed that further factual determinations be made. As argued in the Objection to Jurisdiction supra, there is no judgment in this case that finally determines the rights and liabilities of the parties. The controversy is ongoing and will not be resolved until there is a further evidentiary hearing. Only after such a hearing will the issues be sufficiently sharp and concrete for possible review by this Court. The factual background of this

matter must be fully explored and resolved before review by this Court is warranted.

This Court may be able to avoid a constitutional decision in this matter based on the decision of the trial court after the contemplated evidentiary hearing. Too many contingencies currently exist to warrant Supreme Court review. For example, the biological parents and petitioner may prevail upon remand and the need for Supreme Court review and a constitutional decision would be eliminated. Additionally, certain constitutional issues may be eliminated in the court below and/or additional constitutional issues will be developed and litigated. Allowing review at this early time may result in piecemeal review of Bridget and Lucy's case by this Court which will benefit no one.

In addition, petitioner has not suffered an injury based on the California Court of Appeal opinion and threat of injury is not imminent. No hardship will result if this Court withholds review at this time. The state court opinion requires additional fact finding by the trial court. Until such a hearing occurs and the trial court makes a decision based upon the facts, no party to this litigation has been harmed. Thus, prudential considerations militate against reviewing this case at this time.

II.

BRIDGET AND LUCY'S OVERWHELMING NEED FOR PERMANENCE AND STABILITY REQUIRE THAT SUPREME COURT REVIEW BE DENIED AT THIS TIME.

Bridget and Lucy are now over three years old. Based on the choice of their biological parents, the only family Bridget and Lucy have ever known are James and Colette R., their adoptive parents, and their adoptive sister, the R.'s biological daughter, Hannah. Bridget and Lucy are at the center of this controversy and yet they are completely without fault. Ironically, it is three-year-old Bridget and Lucy who are most affected by this extremely painful litigation. It is also Bridget and Lucy who will be most affected by delaying this matter with interim Supreme Court review.

Bridget and Lucy request that this Court deny review at this time so that their custody status can be finally determined in the trial court upon remand. As noted in Objection to Jurisdiction and Section I. supra, the California Court of Appeal decision requires that further hearings in this matter be held to finally determine the custody of the twins. A complete factual background for this case has not yet been developed.

Supreme Court review at this time will unnecessarily delay this matter. Interim review of Bridget and Lucy's case is unwarranted given that the trial court's fact finding will substantially affect its final judgment.

The cost of the delay associated with interim review is borne by the twins. Petitioner will certainly suffer no harm in allowing this matter to proceed to a final judgment in the trial court. If petitioner does not agree with the final judgment of the trial court, it has lost no rights to seek appropriate appellate review. In contrast, further delays in this matter will be at the psychological and emotional expense of Bridget and Lucy. This litigation must move forward so that the entire matter can be finally resolved as expeditiously as possible.

Additionally, by allowing this case to proceed, options of settlement will undoubtedly be explored between the parties. It is possible that this dispute can be resolved by settlement in a manner all parties agree is in the best interests of the twins.

III.

PETITIONER'S CHARACTERIZATION OF THE HOLDING OF THE CALIFORNIA COURT OF APPEAL IS OVERBROAD.

Petitioner would have this Court believe that every piece of federal legislation affecting federally recognized Indian tribes is in jeopardy based upon the decision of the California Court of Appeal. The California Court of Appeal decision, however, does not have the sweeping effect that petitioner now contends in its effort to have this Court review this matter. The court below stated:

> "We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of - parental rights respecting an Indian child

> who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe." (In re Bridget R., 41 Cal.App.4th at 1492.)

The decision below does not question the overall validity of ICWA or any federal legislation affecting members of federally recognized Indian tribes. By its own terms, the state court opinion is quite limited. The opinion is relevant only in the context of a challenge under ICWA to a voluntary termination of parental rights that is otherwise valid under state law. Moreover, the termination of parental rights has to involve a child who is not domiciled on an Indian reservation.

The California Court of Appeal decision confronts the constitutional challenges involved in this case directly and thoroughly discusses them. The issues were completely briefed in response to a specific briefing order from the California Court of Appeal. The appellate court opinion sensitively balances the competing rights of Bridget and Lucy, the biological parents, and petitioner. The court did not make sweeping constitutional pronouncements calling into question all federal legislation affecting members of federally recognized Indian tribes.

As noted supra, the California appellate court decision is quite narrow. With regard to equal protection violations, the court merely found that certain children with some Indian ancestry are denied equal protection if they are classified as Indian Children by ICWA without a more significant tie between

the child's parent or parents and the Indian Tribe. With regard to due process, the court found that due process was violated only where an adoptive placement has been made, the placement is valid under state law, and the placement is later challenged under ICWA.

Contrary to the petitioner's statements, the California Court of Appeal decision is limited and its effect will be felt in very few cases. The court did not strike down ICWA as written or find that ICWA cannot be applied unless it is severely restricted in its application. Petitioner's claims are simply an effort to secure Supreme Court review where such review is unwarranted.

IV.

THE CALIFORNIA COURT OF APPEAL DECISION DOES NOT CONFLICT WITH UNITED STATES SUPREME COURT PRECEDENT.

Petitioner claims that the lower court decision conflicts with the principles of self-government as enunciated in Morton v. Mancari, 417 U.S. 535 (1974). Petitioner's claim must be rejected.

Morton v. Mancari, 417 U.S. at 535, deals with a challenge by non-Indians to a statutory employment preference for qualified Indians in the Bureau of Indian Affairs ("BIA"). The federal statute in question concerned tribal Indians and their participation in their government. Non-Indians challenged the statute as violative of the equal protection component of the

Fifth Amendment to the United States Constitution. This Court noted that the purpose of the law was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." (Id. at 542.) At the time the legislation in question was passed, Congress was attempting to remedy the situation where the "non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes." (Id.) Congress sought to promote Indian self-government by increasing tribal participation in the BIA. (Id. at 544.)

This Court rejected the equal protection challenge to the hiring preference. This Court held that the employment preference in the challenged statute did not constitute "racial" discrimination because the employment preference did not constitute a racial preference. The preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives are governed by the BIA in a unique fashion." (Id. at 554.)

The recipients of the benefit were individuals living on or near a reservation with a high quantum of "Indian blood" who were also members of federally recognized tribes. Because many individuals of Indian ancestry were excluded from the class of tribal members entitled to the employment preference, this Court concluded that the classification in Morton v. Mancari was

political, and not based solely on race. Therefore, this Court sustained the preference after rational basis review.

ICWA, as written, does not apply to all children who have some degree of Indian ancestry, but only to children who have a political connection to a federally recognized tribe. "Indian child" is defined as

> . . . any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. sec. 1903, subd. (4).)

The application of ICWA to cases like Bridget and Lucy's, however, raises questions about the extent to which ICWA may be applied after an otherwise valid state adoptive placement to children whose ties, and whose parents' ties, to a tribe are solely, or predominantly, blood based. To the extent that these ties become for non-reservation individuals of Indian ancestry less and less political and more and more racial, the purported reach of ICWA raises questions about whether ICWA, as applied, may create racially-based classifications of children which would be subject to strict scrutiny, and not simply rational basis review, under Equal Protection analysis. (Adarand Constructors, Inc. v. Pena, __ U.S. ___, ___, 115 S. Ct. 2097, 2111-2113 (1995).)

The degree of tribal connection and its relevance for determining the scope of ICWA is precisely the issue that will be determined on remand. Where a child's parents have some social,

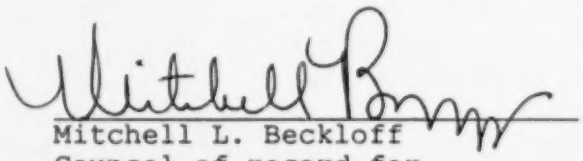
cultural, or political connection to a tribe, ICWA does not violate equal protection principles based on this Court's prior decisions. Where, however, a child's parent or parents appear to have no connection to a tribe, the rationale of Morton v. Mancari does not apply -- the classification cannot be said to relate to some greater tribal issue because of the lack of connection between the parents and tribe. It is this distinction that the California Court of Appeal decision precisely draws.

CONCLUSION

Based on the foregoing, Respondent Minor Children Bridget and Lucy R. respectfully request that this Court deny the petition for writ of certiorari filed by The Dry Creek Rancheria.

Respectfully submitted,

Dated: March 11, 1997



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